Filed 8/16/19 Bramlett v. Bramlett CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANTHEA BRAMLETT, Plaintiff and Appellant, v. ARNOLD BRAMLETT, Individually and as Administrator, etc., et al., Defendants and Respondents.	G056887 (Super. Ct. No. 30-2016-00884205) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Aaron Heisler, Temporary Judge (Pursuant to Cal. Const., art. VI, § 21); and Kim R. Hubbard, Judge. Affirmed.

Law Office of Donald R. Hall and Donald R. Hall for Plaintiff and Appellant.

Bewley, Lassleben & Miller, Leighton M. Anderson and J. Terrence Mooschekian for Defendants and Respondents.

* * *

Alan T. Bramlett (Alan), the decedent in this matter, and Anthea Bramlett (Anthea) were married, divorced, and then allegedly reconciled and lived together without remarrying. Arnold Bramlett (Arnold), Alan's father and the administrator of his estate, filed a petition for probate, alleging Alan died intestate; Anthea filed a competing petition to probate an alleged holographic will. The trial court ultimately granted Arnold's petition and his motion for judgment on the pleadings as to Anthea's petition on various grounds, including the failure to state a claim on which relief could be granted. On appeal, Anthea argues the trial court erred in granting Arnold's motion and that it should have entered her purported holographic will to probate. As we shall discuss below, we find Anthea's arguments unpersuasive and therefore affirm the judgment.

I

FACTS

Alan and Anthea were married in August 1994 and divorced in September, 2000. In 1998, Anthea transferred to Alan, by quitclaim deed, her interest in a house located on Kiowa Lane in Huntington Beach (the Kiowa property).[1]

According to Anthea, she and Alan reconciled in 2001 and lived together "as husband and wife" until Alan died on October 16, 2016. Anthea does not claim that she and Alan were legally remarried.

At the time of Alan's death, his blood relatives included his parents, Arnold and Camilla Bramlett (Camille), and their daughters, Alan's three sisters.[2] Arnold filed a petition for letters of administration on December 8, 2016. The petition alleged Alan

[1] In her petition below, Anthea claimed she "transferred her interest in [the Kiowa property] to [Alan] when their marriage was dissolved," but that assertion is belied by the 1998 date on the quitclaim deed.

[2] Arnold and Camille later disclaimed any interest in Alan's estate in favor of their daughters, Alan's sisters.

died intestate and requested publication. This line of the petition form stated: "Publication will be in (*specify name of newspaper*)" and was filled in with "DAILY JOURNAL."

The petition stated notice had been served by mail to Anthea under her birth name, Anthea Miller, at a residential address in Los Alamitos. Anthea later confirmed in deposition testimony that the address was correct and that she had received the notice.

On November 28, proof of publication in the Huntington Harbour Sun-Journal, a newspaper of general circulation, was filed. On December 15, the court issued an order for probate, granting Arnold full authority as administrator to administer the estate.

In May 2017, Arnold filed his first and final report as administrator. The report stated that administration had been completed and the estate was ready to close. The Kiowa property had been sold without objection for $920,000, and the total estate was worth approximately $993,000. The time for filing claims had expired on April 30, and the heirs were identified as Alan's sisters. No objection to the report was filed.

On September 15, 2017, Anthea filed a pleading entitled "Petition to Determine Title and Require Transfer of Real and Personal Property to Petitioner (Probate Code § 850(a)(2)(C))[3] and, in the alternative, Complaint for: (1) Declaratory Relief; (2) Accounting." (Capitalization, boldfacing and formatting omitted.) Anthea alleged that the postdivorce period during which they cohabitated, she and Alan lived at the Kiowa property. Her petition alleged that Alan stated to her and others that upon his death, the Kiowa property and Alan's bank accounts and retirement accounts would belong to her. "Decedent wanted petitioner to have all of his property." Anthea's petition sought a declaration as to title of the Kiowa property and Alan's remaining

[3] Subsequent statutory references are to the Probate Code unless otherwise indicated.

property, and an accounting of the estate from Arnold. The petition admitted knowledge of the letters of administration and stated that Anthea had vacated the Kiowa property at Arnold's demand that she do so.

The prayer for relief in Anthea's petition also sought a money judgment against each of Alan's sisters for the amount received plus interest, and punitive damages against them if they failed to do so, judgment against Arnold and Camille "in an amount equal to the amount of money awarded to petitioner" plus interest, or alternatively, "in an amount equal to one-half of the money awarded to petitioner" plus interest, and punitive damages against them if they refused to do so. It is entirely unclear under what cause of action or legal theory Anthea sought these additional money judgments.

In December, Arnold filed objections to Anthea's petition on various grounds, including lack of standing, and that despite Alan's alleged oral promises, "no writings are claimed in [Anthea's petition] to exist to memorialize the alleged promises, let alone a writing sufficient to satisfy the formalities requirements of [section] 6110; and no such writing has been admitted to probate."

Further, Arnold objected that Camille and Alan's sisters should be dismissed as respondents, because Anthea's petition failed to state a cause of action against them, and that Anthea, as a former spouse, lacked any interest in an intestate estate. Oral promises, moreover, are not binding against an intestate estate, and Anthea had no right to assert any claims against the estate or the heirs. Alan had made effective gifts to Anthea as beneficiary on a life insurance policy and an investment retirement account, which satisfied any donative intent.

Additionally, because the Kiowa property had been sold (with Anthea's admitted knowledge) the court had no jurisdiction to determine title. The time to file a claim against the estate had also expired. For these and other reasons, Arnold sought dismissal of Anthea's petition.

In response, in January 2018, Anthea claimed she had standing and was not required to file a creditor's claim. She asserted she did not contest title of the Kiowa property but rather sought the proceeds, along with the proceeds of other property. She also claimed Camille and Alan's sisters were properly joined because she had claims against them. If the court was inclined to dismiss, Anthea requested leave to amend.

In February, Arnold filed a motion for judgment on the pleadings as to Anthea's petition. The motion argued that Anthea's failure to submit a claim to the estate is fatal to her claims, and that her petition failed to state a cause of action for distribution of the entire estate to Anthea. In particular, the motion noted Anthea had failed to allege any written agreement to give Alan's property to her.

Anthea opposed, arguing the claims statute did not bar her claim. She also argued that the lack of a writing was not a bar, and produced, for the first time, a greeting card allegedly dated April 15, 2007. The inside of the card stated: "Anthea: [¶] I will forever have an image of you sitting at your computer credenza looking at the screen with your purple curtains and the sky as a backdrop. [¶] I Love You – [¶] Alan." In the same card, Alan allegedly printed, in block letters: "You can have everything that is mine." This was followed by cursive writing: "Alan T. Bramlett." Underneath this was written: "P.S.S. Don't let Kerri Lee Dunbar end up with nowhere to live. I wish you two were friends."[4] Anthea alleged, for the first time, that this constituted a holographic will.

The court granted the motion for judgment on the pleadings and permitted Anthea 21 days to amend. Anthea's first amended petition, filed in April 2018, alleged the greeting card was a holographic will, and further alleged she was not required to file a creditor's claim with the estate. Otherwise, the amended petition was substantially similar to the original petition, including the prayer for relief which sought money

[4] Kerri Lee Dunbar, according to Anthea, was a good friend of Alan's.

judgments against Arnold, Camille, and Alan's sisters without stating under what cause of action she might be entitled to those judgments.

On the next day, Anthea filed her own petition to probate Alan's alleged will. In an addendum, Anthea claimed she "did not receive notice of [Arnold's] petition as required by . . . section 8226(c) because said petition was served on Anthea Miller." She also filed a Proof of Holographic Instrument alleging she was related to Alan as "former spouse" and that she saw Alan write the alleged will.

Arnold filed a new judgment for motion on the pleadings with regard to Anthea's amended petition. Anthea opposed the motion.

Addressing the motion for judgment on the pleadings only, and not Anthea's petition for probate, the trial court found that Anthea had failed to adequately plead her claim. In an order dated July 18, 2018, the court stated: "In relevant part, Section 850(a)(2)(C) [(section 850)] permits 'any interested person' to file a petition requesting that the court make an order under Part 19 of the Probate Code, where 'the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.' [¶] The fundamental defect in this cause of action is the absence of any clear legal theory upon which Anthea bases her claim to all or any specific item or real or personal property that the Decedent 'died in possession of, or holding title to.'"

Anthea had not, the court noted, alleged that she had obtained title to or a property interest in the Kiowa property or Alan's personal property during his lifetime but instead claimed she was promised a distribution from his estate. "But what makes that promise enforceable?" The court asked, "Anthea expressly denied – both in her written opposition and at oral argument – that the promise she seeks to enforce is contractual or quasi-contractual in nature . . . . She does not allege, for example, that the Decedent promised to execute a will or otherwise act to leave her the property at issue in exchange for anything Anthea did, would do, or promised to do. She expressly denies

asserting any type of so-called Marvin claim, whether express or implied. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660 [(*Marvin*)] [discussing unmarried person's rights in contract or quantum meruit to recover for household services rendered to another person].) Anthea alleges only a gratuitous promise by the Decedent to the ex-spouse with whom he reconciled." The court found that "a gratuitous promise standing alone, no matter how heartfelt and sincere, is legally unenforceable." The court continued: "In summary, the court finds Anthea has not alleged any right or enforceable interest in any real or personal property that the Decedent died in possession of, or holding title to. In the absence of any such allegations, Anthea has failed to state a claim under Section 850(a)(2)(C), the express and only ground for her First Cause of Action."

The court concluded the second cause of action for an account was "entirely ancillary to the First" and therefore failed to state a claim. The court found Anthea had made no showing that she would be able to further amend her petition. "Indeed, as discussed above, the arguments she presented in her opposition papers and at the hearing appear to have enclosed her allegations into a box from which there is no escape. Therefore, leave to amend is denied."

Approximately a week later, the court also denied Anthea's petition for probate, concluding it was untimely under section 8226, subdivision (c).

Anthea now appeals.

II

DISCUSSION

Anthea has, essentially, two overarching arguments. First, she contends the trial court should have admitted her competing holographic will to probate because the notice of Arnold's petition was insufficient under various theories, and therefore, the time limits set forth in section 8226, subdivision (c), never began to run, or that section 8226, subdivision (c), does not apply at all. Second, she argues that Arnold's motion for

judgment on the pleadings should not have been granted. We address these contentions in turn.

A. Notice in Anthea's Birth Name

As noted, Anthea's first attack on the judgment is her assertion that her attempt to probate the purported holographic will was not untimely because Arnold's notice of his petition for letters of administration was insufficient.

We begin, of course, with the presumption that the lower court's orders and judgment are correct. "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.)

A trial court's legal determinations are reviewed de novo. (*Roberts v. United Health Care Services, Inc.* (2016) 2 Cal.App.5th 132, 149.) Questions of statutory construction are also reviewed de novo. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95-96.)

Section 8226, subdivision (c), states: "If the proponent of a will has received notice of a petition for probate or a petition for letters of administration for a general personal representative, the proponent of the will may petition for probate of the will only within the later of either of the following time periods: [¶] (1) One hundred twenty days after issuance of the order admitting the first will to probate or determining the decedent to be intestate. [¶] (2) Sixty days after the proponent of the will first obtains knowledge of the will."

Anthea admits that she filed her petition for probate on April 25, 2018, more than 120 days after Alan's petition was granted on December 15, 2016. She argues, however, that this time limit never began to run because Arnold mailed notice to the

correct address in "Anthea's *maiden* name, instead of Anthea Bramlett, Anthea's *legal* name." Anthea claims the purported requirement that she must receive notice under the correct name is "jurisdictional" and therefore the court's order was void.

In addition to the requirement set forth in section 8226, Anthea points to Probate California Rules of Court, rule 7.51(a)(1), which states that "[d]irect notice" of hearing for petition for probate is required, and that notice by mail "must be mailed individually and directly to the person entitled to the notice."

Anthea does not offer a single case in which a relevant party received actual notice of a probate petition but the court found that notice insufficient because notice was given in someone's birth name rather than a married name. Nor does she provide any cases under which a court found error under even vaguely similar circumstances. Instead, she relies on a tortured exercise in statutory interpretation to convince us that the "notice" requirement in section 8226 does not mean actual notice but something else instead.

We find this entirely unpersuasive. "In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. [Citation.] We begin with the language of the statute, giving the words their usual and ordinary meaning. [Citation.] The language must be construed 'in the context of the statute as a whole and the overall statutory scheme, and we give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."' [Citation.] In other words, '"we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]"' [Citation.] If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's

general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.)

The purpose of both the Probate California Rules of Court and the statute, as expressed by its plain language, is to ensure that proper individuals receive actual notice of probate proceedings. The time limit is triggered when "the proponent of a will has received notice." Anthea, as she has admitted, "received notice." Statutes and rules do not exist to play semantic games. The purpose of the statute – that all appropriate individuals are notified of a probate petition – would be frustrated if we engaged in the absurd hypertechnical exercise Anthea urges.

For the same reason, we reject Anthea's argument that notice in her birth name was insufficient because it was not "'given directly to, or received personally'" by her. Again, this is hypertechnical gamesmanship. It is undisputed she received the notice directly and personally, and the use of her birth name is simply not relevant to the adequacy of that notice.

Anthea next argues that *Estate of Kelly* (2009) 172 Cal.App.4th 1367 (*Kelly*), supports her contention that the time limits set forth in section 8226 never began to run. In that case, the decedent's father contended the decedent died intestate, while a nonprofit organization contended it was the sole beneficiary under a holographic will. The father filed a petition for letters of administration in March 2007, and in May, gave the nonprofit notice it was beneficiary of certain bank accounts. The nonprofit, in the following months, notified the father of the holographic will the decedent had sent four years earlier, and requested special notice of all estate matters under section 1250. In December, the nonprofit petitioned to correct the record, admit the holographic will to probate, and issue other pertinent orders. (*Id.* at pp. 1370-1371.)

The father argued the nonprofit's petition was untimely, noting a 225-day lapse between the probate order and its petition to probate the holographic will. The nonprofit argued it had never received proper notice. The court found that the

administrator had duties not to mislead the court and to ensure the estate was probated and that it followed the decedent's wishes. The court concluded "that written notice on a Judicial Council form was required to trigger the time limits of . . . section 8226, subdivision (c)." (*Kelly*, *supra*, 172 Cal.App.4th at pp. 1371-1372.)

The appellate court ultimately agreed, finding that section 8226, subdivision (c), did not apply because the nonprofit "never received notice of the petition for letters of administration, as required to trigger the statute." (*Kelly*, *supra*, 172 Cal.App.4th at p. 1370.) The dispute, the court noted, focused on the statutory language regarding receiving "'notice of . . . a petition for letters of administration.'" While the father contended that it was sufficient that the nonprofit knew the decedent's estate was being administered as an intestate estate, the court disagreed. (*Id.* at pp. 1372-1375.) Rejecting that "notice" meant only awareness or knowledge, the court found that "'received notice' in the context of petitions for letters of administration, or even in the context of the Probate Code as a whole, notice must be given by mail or personal delivery." (*Id.* at p. 1374.)

Anthea argues that "Arnold's argument of 'actual notice' is no different than the administrator's argument of awareness or knowledge in *Kelly*." Anthea is wrong; *Kelly* supports Arnold's arguments far more than it does Anthea's. The crux of the problem in *Kelly* was that the father had never sent written notice by mail or personal delivery in the required form, arguing instead that mere *knowledge* without written notice was sufficient. Anthea, by contrast, argues that written notice by mail that she admits receiving is insufficient because it was in her maiden name. Those arguments are not anywhere close to similar.

Other language in *Kelly* also supports Arnold's side of the argument. While Anthea argues that actual notice is insufficient, and that the hypertechnicalities are more important than receipt of notice, the court in *Kelly* discussed what it means to have "'received notice of . . . a petition for letters of administration.'" (*Kelly*, *supra*, 172

Cal.App.4th at p. 1373.) The *Kelly* court stated: "Focusing on the language, we begin with the word 'received.' The usual and ordinary meaning of 'received' suggests the proponent of the will was sent or given notice. For example, '"[a]ctual notice" is "notice given directly to, or received personally by, a party."'" (*Ibid*.) Thus, *Kelly* holds up actual notice as the gold standard for what it means to have "received notice" under section 8226, subdivision (c) – precisely the opposite of Anthea's argument.

Here, Anthea concedes she had written notice, which was indisputably served in the prescribed form, of the petition for probate. Her argument that this notice was insufficient because it was provided under her birth name is simply unmeritorious, holding form high above substance or due process. Accordingly, we reject this contention entirely.

B. Notice in the Wrong Newspaper

Anthea next argues that notice was insufficient, and therefore the time period set forth in section 8226, subdivision (c), never began to run, because Arnold published notice in the incorrect newspaper. The pertinent Judicial Council form had a preprinted line stating: "Publication will be in (*specify name of newspaper*)" and Arnold filled it in with: "DAILY JOURNAL." Publication was instead in the Huntington Harbour Sun-Journal. Anthea argues that such publication was not only an error but that it deprived the probate court of jurisdiction to enter the order for probate.

Anthea seems to argue, without outright doing so, that "DAILY JOURNAL" must mean the Los Angeles "Daily Journal," a legal newspaper familiar to judges and lawyers throughout Southern California. Even assuming that is correct, we are left with the question whether an error on the Judicial Council form submitted to the court was sufficient to strip the probate court of jurisdiction.

We find it was not. The statute regarding publication of the hearing, section 8121, subdivision (b), states: "Notice shall be published in a newspaper of

general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction under Section 7052. If there is no such newspaper, or if the decedent did not reside in a city, or if the property is not located in a city, then notice shall be published in a newspaper of general circulation in the county which is circulated within the area of the county in which the decedent resided or the property is located. If there is no such newspaper, notice shall be published in a newspaper of general circulation published in this state nearest to the county seat of the county in which the decedent resided or the property is located, and which is circulated within the area of the county in which the decedent resided or the property is located."

It is undisputed that notice was actually published in the Huntington Harbour-Sun Journal, "a newspaper of general circulation" in Orange County.[5] Anthea offers no authority stating that even though notice was actually published in an appropriate newspaper and fully complied with the statute, an error stating the name of the publication on a Judicial Council form somehow invalidates the published notice. While the form is mandatory and must be used, it does not follow that an error on the form entirely negates full compliance with the statutory requirements, much less defeats the court's jurisdiction.

The statutory purpose of the notification requirement does not support Anthea's desired conclusion either. "Notice is the cornerstone of estate proceedings." (*Estate of Stevenson* (2006) 141 Cal.App.4th 1074, 1087.) The intent of notice by publication is to disseminate notice far and wide, indeed, to "'the entire world.'" (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1042.) In probate proceedings, publication is intended to provide constructive notice to potential heirs. (*Id.* at p. 1043.) But what

[5] Indeed, had notice been published in the Los Angeles Daily Journal, Anthea might have an argument, as there is no evidence that publication qualifies as "a newspaper of general circulation" in Orange County. (§ 8121, subd. (b).)

Anthea seems to miss is that it is the publication itself, not what is noted on a form submitted to the court and not what is published anywhere, that provides notice.

Thus, we find that any error on the Judicial Council form did not strip the court of jurisdiction to enter the order for probate. If the court's choice to overlook the discrepancy between the form and the notice of publication was error, then Anthea must demonstrate prejudice before reversal is required. As she received actual notice and in no way relied on the constructive notice provided by publication, no prejudice is present, and we find no reversible error.

C. Timeliness of Petition

Anthea next argues that even if publication and notice were sufficient, Anthea's petition to probate the holographic will was nonetheless timely. First, she argues that section 8221, subdivision (b)(2), does not apply at all. Second, even if it does, she claims the "triggering date" should be the date on which Anthea's attorney allegedly "discovered" the greeting card purported to be a holographic will, rather than the date on which Alan wrote the card.

Anthea's first contention concerns the language in section 8226, subdivision (c)(2), that a petition for probate must be filed within 60 days after the proponent "'first obtains knowledge of the will.'" Anthea argues that language means that if the proponent first obtains that knowledge during the decedent's lifetime, including constructive knowledge through possession, section 8226, subdivision (c)(2), simply does not apply. Anthea provides no case law in support of this novel interpretation, instead undertaking another exercise in creative statutory construction. She claims "it seems unlikely that the legislature intended to bar Anthea's holograph petition and defeat Alan's testamentary wishes" but this ignores the plain language of the statute and its strict time limits.

Anthea next argues that if section 8226, subdivision (c)(2), does apply, "the triggering date" should be the date on which her attorney was alleged to have found the greeting card and decided it was a potential holographic will, and then filed the petition within 60 days. Anthea contends that "[a]bsent a clear expression of legislative intent" that she should not be barred from filing a petition to probate the alleged holographic will more than 16 months after Arnold's petition. But there is such a clear expression in the statute itself, which requires a competing petition to be filed within 120 days.

Anthea unquestionably had possession of the alleged holographic will for years before Alan died; she had "knowledge" of it within the statute's plain meaning. Her suggested expansive reading of the statute would throw the timelines in the statutory scheme into chaos, permitting new wills to be submitted long after the 120-day statutory limit. We simply find no legislative intent or precedent for such an interpretation.

D. Motion for Judgment on the Pleadings

As "'a motion for judgment on the pleadings is similar to a demurrer, the standard of review is the same.'" (*Estate of Dayan* (2016) 5 Cal.App.5th 29, 39-40.) "We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187.)

A person may bring a claim for declaratory relief, "in cases of actual controversy," to obtain a judicial "declaration of his or her rights and duties" with respect to another. (Code Civ. Proc., § 1060.) "[T]he courts require that a legally cognizable theory of declaratory relief is being pursued, in order for such a cause of action to be stated." (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562.)

Anthea claims to have such a basis under section 850, which states, in relevant part: "The following persons may file a petition requesting that the court make an order under this part: [¶] . . . [¶] (2) [A]ny interested person in any of the following

cases: [¶] . . . [¶] (C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another." Section 850 is intended to operate as a mechanism for pursuing "claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part." (§ 855.)

As the probate court pointed out, "The fundamental defect in this cause of action is the absence of any clear legal theory upon which Anthea bases her claim to all or any specific item or real or personal property that [Alan] 'died in possession of, or holding title to.'" Anthea does not claim that she had title to the Kiowa property or any of Alan's personal property before his death. In *Estate of Myers* (2006) 139 Cal.App.4th 434, this court considered standing under section 850 where a creditor had an unsatisfied claim based on a business debt that predated the decedent's death. (*Id.* at p. 437.) The creditor filed a claim under section 850 seeking an order to account for and disgorge the proceeds of the estate, based primarily on a fraudulent transfer of real property. We concluded the creditor's petition stated a valid claim for fraudulent conveyance and fell within the parameters of section 850. (*Id.* at p. 442.)

In *Estate of Myers*, *supra*, 139 Cal.App.4th 434, there is no question that the creditor had properly alleged the decedent died in possession of property to which he already had a claim. But where is Anthea's claim under section 850? She did not have any claim on Alan's property prior to his death – she concedes as much. She argued below that she was supposed to obtain Alan's property *after* his death. Such a "claim" may not be brought under section 850. (*Estate of Linnick* (1985) 171 Cal.App.3d 752, 763.)

Further, she fails to allege any *enforceable* promise under any theory. She denied below that she was attempting to allege a claim for quasi-contractual relief under *Marvin*, *supra*, 18 Cal.3d 660. That left only an unenforceable gratuitous promise. This fails to state a claim that "decedent died in possession of, or holding title to, real or

personal property, and the property or some interest therein is claimed to belong to another." (§ 850.) At most, Anthea alleges that Alan desired or promised to transfer his property to her upon his death. But this fails to state a claim under the statute, which is her only basis for declaratory relief.

Moreover, we agree with Arnold that even if she had managed to state some kind of claim for relief under some theory, her failure to submit a timely creditor's claim was fatal. Anthea seems to advance the argument that a claim under section 850 is not required to meet the creditor claims requirements, including timeliness, but this is simply unsupported by law. Section 9002 states that "[a]ll claims shall be filed in the manner and within the time provided in this part" and that "[a] claim that is not filed as provided in this part is barred."

"In an action at law for damages [or for quantum meruit], the plaintiff is a creditor and must file his claim against the estate of the deceased promisor or be forever barred." A complaint which does not allege such a filing "fails to state a cause of action." (*Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 829-830, 833.) Anthea cannot avoid this requirement by asserting that she was seeking to determine "title" to the property when her purported declaratory relief petition sought money damages against Arnold, Camille, and their daughters. She was seeking money and was required to file a timely creditor's claim.

Accordingly, we find no error in the probate court's conclusion that Anthea failed to state a claim for declaratory relief. As the claim for accounting was entirely derivative of her first claim, it was also without merit.

Anthea argues she is entitled to leave to amend. "Whether a motion for judgment on the pleadings should be granted with or without leave to amend depends on 'whether there is a reasonable possibility that the defect can be cured by amendment . . . .' [Citation.] When a cure is a reasonable possibility, the trial court abuses its discretion by not granting leave to amend and a reviewing court must reverse.

[Citation.] 'The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.)

In support of this argument, Anthea states what she is *not* arguing – a claim for quantum meruit under *Marvin*, or an "'express' contract to make a will." She claims there is "a contract or other remedy available under *Marvin* based upon Alan's expressed intention and Anthea's implied acceptance or, alternatively, upon an understanding, including the 'tacit understanding' enunciated in *Marvin*, that Anthea would inherit Alan's estate."

First, it is far from clear that she made this argument in probate court – the court found that Anthea "expressly denie[d] asserting any type of so-called *Marvin* claim, whether express or implied." Second, this is a highly doubtful legal argument, and one she could have developed here, but does not. It essentially states that her current pleading is already adequate. It does not offer any clarification as to what facts Anthea would plead in an amended complaint that she has not already stated. Accordingly, we find that Anthea has not met her burden to demonstrate an abuse of discretion in denying leave to amend.

Finally, Anthea claims that "Arnold's remaining arguments do not support his motion for judgment on the pleading" but she has matters backward. It is not up to Arnold to demonstrate that his motion should have been granted; it is up to her to demonstrate that it should not have been. None of her offered reasons do so. Accordingly, we find no error.

III

DISPOSITION

The judgment is affirmed. Arnold is entitled to his costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.